

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA
Chapter 11

Debtor.

**DEBTOR'S BRIEF IN RESPONSE TO MOTION OF UNITED FOOD AND
COMMERCIAL WORKERS UNION LOCALS 540 AND 1564 FOR PAYMENT
OF VACATION AND SEVERANCE BENEFITS**

The Debtor in Possession, Furr's Supermarkets, Inc. ("Furr's" or the "Debtor"), files the brief in opposition to the Motion of United Food and Commercial Workers Union Locals 540 and 1564 For Order Allowing and Requiring Immediate Payment of Administrative Expenses, filed September 21, 2001 and docketed as number 1088 (the "Motion").¹

I. THE UNION'S ARGUMENT

The Debtor believes the Union's severance and vacation pay claims are unsecured pre-petition claims or, alternatively, that union employees are entitled only to the pro rata portion of the benefits attributable to their post-petition service. In contrast, the United Food and Commercial Workers Union Locals 540 and 1564 (the "Union") asserts that all severance and vacation amounts owed to union employees are entitled to administrative expense priority under 11 U.S.C. § 507. If the Union's position prevails, the total

¹ The Court has determined that, as a threshold matter, it will decide whether and to what extent the severance pay benefits should be allowed as an administrative expense pursuant to Bankruptcy Code §503(b) assuming (without deciding) that all allegations in the Motion and attachments thereto are true. Accordingly, the Debtor assumes for purposes of this brief only that the allegations are true, without waiving its right to dispute the allegations.

123

administrative expense would be approximately \$10 Million, substantially increasing the likelihood the bankruptcy estate would be administratively insolvent.

In support of its assertion that all severance and vacation pay claims are entitled to administrative status, the Union makes two arguments: First, the Union argues that the Debtor has taken no action to reject the collective bargaining agreements at issue (the “CBAs”), and therefore has assumed the CBAs. Under this argument, the severance and vacation claims are entitled to administrative priority because the CBAs are now post-petition contracts.

Alternatively, the Union argues the severance claims are entitled to administrative status under 11 U.S.C. §507 even if Furr’s did not assume the CBAs. In support of this argument, the Union relies upon certain memoranda newsletters and Furr’s disseminated to employees during the Chapter 11 case, which the Union alleges converted the pre-petition unsecured severance and vacation pay claims into post-petition administrative expense claims.

While the Debtor is sympathetic to its work force, and does not discount the real hardship this case has caused to many, as shown below, the Union’s arguments fail. Furr’s has not assumed the CBAs, either explicitly or tacitly. Without such an assumption, the severance and vacation claims are either entirely unsecured pre-petition claims or are at best entitled to administrative status only to the extent earned post-petition. The existence and legal effect of the memos, about which the Union and the Debtor disagree, do not change the result.

II. THE DEBTOR HAS NOT ASSUMED THE CBAs AGREEMENTS, SO THERE CAN BE NO ADMINISTRATIVE EXPENSE STATUS FOR SEVERANCE CLAIMS ON THAT BASIS

A. The Debtor Did Not Expressly Assume the CBAs.

The Debtor has not expressly assumed the CBAs. No motion has been filed seeking to assume the CBAs, no notice of a deadline to object to such a motion was ever served, and no order has been entered approving such assumption. The Union does not dispute this.

B. The Debtor Did Not, and Could Not, Assume the CBAs Implicitly.

The Union asserts the Debtor has implicitly assumed the CBAs because it has not rejected them. That is incorrect.

1. The *Family Snacks* Case Refutes the Union's Position. The Eighth Circuit Court of Appeals recently addressed and rejected this very contention in *In re Family Snacks, Inc.*, 257 B.R. 884, 899-907 (8th Cir. 2001). The Union's position in this case bears a striking resemblance to the position of a different local of the same union in the *Family Snacks* case. In that case, the debtor was a producer and distributor of potato chips and other snack foods. The debtor had, pre-petition, entered in a collective bargaining agreement with a local chapter of the Union. *Id.* at 887. After commencing its chapter 11 case, the debtor began attempting to sell its increasingly financially distressed company. The bankruptcy court in *Family Snacks* approved a sale of substantially all of the debtor's assets on an expedited basis. *Id.* at 887-88. The Union argued that the debtor had impliedly assumed the collective bargaining agreement because the agreement had not been rejected before the sale, the bankruptcy court had denied a motion by the debtor to reject the agreement, and negotiations to reject a collective bargaining

agreement must commence before a sale of the company's assets. *Id.* at 896, 888-89. The Eighth Circuit rejected each of these arguments and held that the debtor had not assumed the collective bargaining agreement.

2. Contracts, including the CBAs, Can Only Be Assumed After Notice and a Hearing. Bankruptcy Code §365(b) governs assumption of a collective bargaining agreement, so that no assumption can be made without court approval. *In re Family Snacks, Inc.*, 257 B.R. 884, 899-907 (8th Cir. 2001). Code §1113, by its terms, governs rejection, termination, or alteration of collective bargaining agreements. It does not address assumption except to describe the character of rejection by identifying it with its opposite. 257 B.R. at 901, quoting *In re Massachusetts Air Conditioning and Heating Corp. v. McCoy*, 196 B.R. 659, 663 (D. Mass. 1996). See also *In re Tycroft Company*, 229 B.R. 685, 688 (E. D. Mich. 1999). Congress could have, but chose not to, expressly provide that Code §1113 is not to be read in conjunction with Code §365. Compare Code §1167, which provides that Code §365 does not apply to collective bargaining agreements subject to the Railway Labor Act. See *Family Snacks*, 257 B.R. at 901, n. 15.

Congress enacted Code §1113 in response to the Supreme Court's decision in *National Labor Relations Board vs. Bildisco*, 465 U.S. 513, 104 S. Ct. 1188 (1984), relating to rejection of collective bargaining agreements. See *In re Adventure Resources, Inc.*, 137 F. 3d 786, 797-98 (4th Cir. 1998). In adopting Code §1113's provisions limiting rejection of collective bargaining agreements, Congress did not otherwise restrict the applicability of Code § 365. *Id.* at 798. Accord *In re Tycroft Company*, 229 B.R. at 688.

Under Code §365(a), and Bankruptcy Rules 6006(a) and 9014, assumption of an executory contract, including a collective bargaining agreement, requires court approval

after notice to creditors. *In re Family Snacks, Inc.*, 257 B.R. 884, 901-907 (8th Cir. 2001); *In re Gateway Apparel, Inc.*, 238 B.R. 162, 164 (E.D. Mo. 1999); *In re Tycoft Company*, 229 B.R. at 688-89. See generally *Sharon Steel Corp. v. Natural Fuel Gas Distribution Corp.*, 872 F.2d 36, 41 (3rd Cir. 1989) (a stipulation of adequate assurance could not constitute an implied or de facto assumption of an executory contract because no motion to assume was filed under Code §365(a), no notice to creditors was given, no plan had been confirmed, and no hearing was held on assumption); *In re Swallen's, Inc.*, 210 B.R. 120, 122 (S.D. Ohio 1997) (“there is no room in the bankruptcy scheme for assumption of an executory contract by implication”); *In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992) (an assumption of a contract cannot be implied because it requires specific court approval pursuant to a motion in accordance with Bankruptcy Rule 6006).

Code §365(a) provides that a debtor may assume an executory contract “subject to the court’s approval.” Bankruptcy Rule 6006(a) provides that a proceeding to assume an executory contract is governed by Bankruptcy Rule 9014. Bankruptcy Rule 9014 provides that the relief sought must be requested by motion, with reasonable notice and an opportunity to be heard. The assumption of an executory contract can transform what otherwise would be pre-petition unsecured claims into administrative claims. Code §365(a) and Bankruptcy Rules 6006(a) and 9014, create important protections for creditors by requiring court approval for a debtor’s assumption of an executory contract (or unexpired lease), after notice and an opportunity to be heard.

3. No Deadline has Passed to Reject the CBAs. No deadline has expired for the Debtor to seek to reject the CBAs, so the Court cannot draw any

conclusion from the fact that Furr's has not yet sought to assume or reject the CBAs. Neither Bankruptcy Code §1113, nor Code §365, imposes any deadline prior to plan confirmation. If this chapter 11 case were to convert to a case under chapter 7, the chapter 7 trustee still could reject the CBAs under Code §365 without complying with Code §1113. Code §1113 has no application in a chapter 7 case. *In re Rufener Construction, Inc.*, 53 F.3d 1064, 1066-68 (9th Cir. 1995). As the *Rufener* court points out, Code §1113(a) provides that the "trustee" referenced in §1113 is a trustee "appointed under the provisions of this chapter [*i.e.* chapter 11]." Further, Code §103(f) provides that except as provided in Code §901, subchapters I, II and III of chapter 11 apply only in cases under chapter 11. Code §1113 is part of subchapter I of chapter 11.

Moreover, if this case were to remain in chapter 11, the Debtor still could seek to reject the CBAs under Code §1113.² The timing of rejection of a collective bargaining agreement is governed by Code §365(d), which allows a debtor to defer such decision until plan confirmation, not by §1113, which is silent on the issue. *In re Family Snacks, Inc.*, 257 B.R. at 895-96.

Further, a collective bargaining agreement can be rejected by a chapter 11 debtor under §1113 following a sale of the debtor's assets. Bankruptcy Code §1113(b)(1) requires the debtor to make a proposal to the union, prior to filing a motion to reject, to modify a collective bargaining agreement as necessary to permit a reorganization of the

² In fact, prior to the closing of the sale with Fleming, the Debtor already had initiated the process under Code §1113 to modify the CBAs as they relate to severance pay. These negotiations took place in contemplation of the hearing on the Debtor's motion to approve its wind-down plan. When the wind-down motion was continued, and subsequently no longer was "on the table," these negotiations ceased. If the Debtor were to remain in chapter 11 beyond the end of 2001, it intends to file a motion to reject (or modify) the CBAs pursuant to Code §1113.

debtor. Code §1113(b)(1) uses the term “reorganization,” rather than the narrower term “rehabilitation.” Chapter 11, which is entitled “reorganization,” permits reorganization both through the orderly liquidation of assets to maximize the return to creditors, as well as through a restructuring of debt for an ongoing business, or some combination thereof. *See* Code §1123, including §1123(a)(D). Congress could not have intended the anomalous result that in a liquidating case a debtor forfeits the ability to modify or reject a collective bargaining agreement unless it liquidates in chapter 7. *In re Family Snacks, Inc.*, 257 B.R. at 896, *quoting In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 517 (Bankr. S.D.N.Y. 1991). *See also* other cases cited in *Family Snacks, Inc.*, 257 B.R. at 893-94.

4. Policy Considerations Dictate that Contracts Cannot Be Assumed Implicitly. An ill-advised assumption of an executory contract or lease can overwhelm an estate, to the substantial prejudice of its creditors and other parties in interest, by creating millions of dollars of administrative claims and preventing confirmation of a plan under which administrative claims must be paid on the plan effective date. *See Code* §1129((a)(9)(a). Here, for example, the Union claims more than \$10 Million in severance benefits. Had Furr’s filed a motion to assume the CBAs and thus shoulder an additional \$10 Million in administrative debt, objections to the Motion would have come from every corner. Permitting the implied assumption of executory contracts and unexpired leases, without court approval and without filing a motion or any notice to creditors, would ignore express statutory language and set a dangerous precedent.

5. The Cases the Union Relies Upon Do Not Change the Result. The Union relies on *In re Adventure Resources, Inc.*, 137 F. 3d 786, 797-98 (4th Cir. 1998) for its assertion that the debtor assumed the CBAs by not rejecting them. *Adventure*

Resources, while recognizing that assumption of collective bargaining agreements is governed by Code §365, not §1113, stated without analysis or discussion that the debtor had assumed the contract by not rejecting it. *Id.* at 798. The Court relied entirely on a citation to *In re Roth American Inc.*, 975 F.2d 949, 954 (3rd Cir. 1992). In *Roth American*, the Court did say in passing that the debtor could be deemed to have assumed a collective bargaining agreement by not rejecting it. However, the Court nevertheless denied the union's request in that case that pre-petition vacation and severance benefits owed to union employees be given administrative expense treatment. *Id.* at 957-58. As the Eighth Circuit observed in *Family Snacks*, the deemed "assumption" of the collective bargaining agreement in *Roth* could not have been an assumption within the meaning of Code §365 (or §1113 if that was what the court was referring to). 257 B.R. at 904, n. 18.

This Court, like the Eighth Circuit in *Family Snacks* and the many other courts cited in that opinion, should reject the notion that executory contracts and unexpired leases, including collective bargaining agreements, can be impliedly assumed without court approval, as Code §365(a) requires, and without the filing of a motion or any notice to creditors, as Bankruptcy Rules 6006(a) and 9014 require.

III. BANKRUPTCY CODE §1113 DOES NOT MODIFY §507

Whether the severance pay benefits are entitled to administrative expenses status is governed by Code §507(a), not Code §1113. Code §1113 governs only the conditions under which a debtor in possession may modify or reject a collective bargaining agreement; Code §507 governs the priority of claims under such agreements. *Adventure Resources*, 137 F. 3d at 796-97; *In re Ionosphere Clubs, Inc.*, 22 F.2d 403, 406-408 (2nd Cir. 1994); *Roth American*, 975 F.2d at 956-57. See generally *In re Jones Truck Lines*,

Inc., 130 F.3d 323, 330 (8th Cir. 1997) (citing *Ionosphere* and *Roth* with approval as to the relationship between Code §§507 and 1113. in connection with a holding that §1113 does not supercede the avoidable preference provisions of §547).³

The Second Circuit explained the genesis of §1113 in *Ionosphere*:

In enacting section 1113, Congress was concerned with preventing employers from using bankruptcy as an offensive weapon to rid themselves of burdensome collective bargaining agreements, not with reordering the priority in which claims would be paid.

22 F.2d at 408. Section 507 carefully balances competing policies for ordering priorities. *Id.* Code §1113 does not address the priority to be accorded claims arising from obligations under collective bargaining agreements. *Id.* If Congress had intended to alter the general priority scheme set forth in §507, it would have done so explicitly, as it did, e.g. under Code §1114(c)(2). *Id.* The CBAs, unless modified, establish the Debtor's obligations with respect to severance pay benefits. Code §507 does not affect those obligations, but establishes the priority of the claims for purposes of payment. *See Id.* at 407. Unless rejected, the collective bargaining agreement is respected, but the financial obligations issuing from it are accorded priority consistent other provisions in the Bankruptcy Code. *Id.* Accordingly, Code §507, not Code §1113, governs the priority of the obligations created by the CBAs.

³ The only circuit court holding to the contrary is *In re Unimet Corp.*, 842 F.2d 879 (6th Cir.) *cert. den.*, 488 U.S. 828, 109 S. Ct. 81 (1988). The Second, Third and Fourth circuits have expressly rejected that decision. As the Second Circuit noted in *Ionosphere*, the *Unimet* decision subsequently was codified in Code §1114, which would have been unnecessary if the result already was compelled by Code §1113. *Ionosphere*, 22 F.3d at 408.

IV. UNDER §507, IF THE CBAs ARE REJECTED THE SEVERANCE CLAIMS WILL NOT BE ENTITLED TO ADMINISTRATIVE STATUS AT ALL OR, ALTERNATIVELY, WILL BE SO ENTITLED ONLY TO THE EXTENT ATTRIBUTABLE TO POST-PETITION SERVICES

As discussed above, the CBAs have not yet been assumed or rejected, and the Debtor (or a trustee) still has the right to seek to reject the CBAs, whether in chapter 7 or in chapter 11. (See Section II (B)(3), above). Further, if this case were converted to a case under chapter 7, Code §365, not §1113, would govern rejection. If the CBAs were assumed, any severance claims arising under the CBAs would be entitled to administrative status. On the other hand, if the CBAs were rejected, severance claims arising under the CBAs would be unsecured claims, or alternatively only the portion of the claims attributable to services rendered post-petition should be allowed as administrative claims.⁴

A. Under 10th Circuit Law, The Severance Claims Are Pre-Petition Unsecured Claims.

Under Tenth Circuit precedent, if the CBAs are rejected the Union severance pay claims would be unsecured claims that would not be entitled to any administrative priority. The Tenth Circuit has adopted a two-part test for determining whether an expense should be given an administrative priority in a chapter 11 case.⁵ First, the expense must arise out of a transaction between the creditor and debtor in possession or trustee. Second, if the first part of the test is satisfied the expense is entitled to an administrative priority only to the extent the consideration supplied by the creditor was

⁴ The Debtor expects that either this case will convert before year end, in which case the CBAs will be rejected by a chapter 7 trustee under Code §365, or the chapter 11 Debtor will make further efforts seek to modify the CBAs under Code §1113 with respect to the severance benefit obligations, or to reject the CBAs if such a modification is not accomplished.

both supplied to and benefited the debtor in possession or trustee. *In re Amarex, Inc.*, 853 F.2d 1526, 1530 (10th Cir. 1988). The Court referred to this as the *Mammoth Mart* test, established by the First Circuit in a case bearing that name. *Id.* at 1530 n. 4. The Union severance claims do not satisfy the first part of the test, and therefore are not entitled to any administrative priority.

In *Amarex*, an employee was to receive a base salary of \$55,000 and an annualized bonus of \$10,000 for the first year of employment. *Id.* at 1528. The company was placed into an involuntary chapter 11 before the first year of employment expired. The employee continued to work until the end of the employment year, and then filed a motion to compel payment of the bonus as an administrative expense. After analogizing the bonus claim to a claim for severance or vacation pay, the Tenth Circuit observed that the right to a priority does not depend on whether the obligation to pay arose post-petition; rather, the critical issue is whether or to what extent the consideration supporting the claim arose post-petition. *Id.* at 1531-32. The Court regarded the bonus as earned as part of salary day-by-day throughout the year as the employee continued to work, because the payment was a “guaranteed annualized bonus” and the employee could draw against it as monthly advance, even though the bonus was payable only upon completion of the first year of service. *Id.* at 1532. The Court therefore, apparently finding that the first part of the *Mammoth Mart* test was satisfied, held under the second part of the test that only the portion of the bonus attributable to services performed post-petition is entitled to priority of payment as an administrative expense. *Id.*

⁵ The burden of proving entitlement to an administrative priority is on the person claiming the priority. *In re Amarex, Inc.*, 853 F.2d 1526 (10th Cir. 1988).

The Tenth Circuit recently applied what it called the “*Amarex/Mammoth Mart* test” in another case involving employment contracts. In *In re Commercial Financial Services, Inc.*, 246 F.2d 1291 (2001), the Tenth Circuit observed: “*Amarex* is not limited to cases involving employee bonuses and sets out this circuit’s definitive procedure for determining all administrative expense claims, including the severance-pay-type claims presented here.” *Id.* at 1294.

In *Commercial Financial*, the company and certain employees entered into employment contracts pre-petition under which the company promised to pay the employees lump sum payments upon termination of their employment other than for cause. *Id.* at 1292-93. The company filed a chapter 11 case, terminated the employees without cause within a month after the filing, and soon thereafter rejected the employment contracts. *Id.* at 1293.⁶ The Court held that no part of the lump sum severance payment should be accorded administrative status, because the claims did not arise from a transaction with the debtor in possession. *Id.* at 1294. The facts that there existed a pre-petition contract, and that the debtor in possession continued to employ the employees post-petition, were held insufficient to establish a transaction with the debtor in possession for administrative priority purposes. *Id.* The Court further held that is it not determinative that payment was contingent on termination without cause, which occurred post-petition, as courts look to when the acts giving rise to liability took place, not when they accrued, for administrative priority purposes. *Id.* at 1295.

⁶ Although the Debtor discharged the employees within a month following the bankruptcy filing, and rejected the contract soon thereafter, the amount of the time that elapsed between the petition date the discharge and rejection makes no conceptual difference to the issues before the Court.

The *Commercial Financial* court distinguished *Amarex*, where it held that the portion of a bonus attributable to post-petition services was entitled to an administrative priority on the grounds that in *Amarex* the “bonuses” were really part of the employees’ agreed salary, which was earned day-by-day, since the bonuses were “annualized” and the employees could take monthly draws against them. *Id.* at 1294. The Tenth Circuit also expressly rejected the notion that severance pay is entitled to an administrative priority because it is compensation for the hardship employees face when terminated, and therefore is earned upon dismissal. 246 F.2d at 1294, n. 2.

Under *Commercial Financial* and *Amarex*, the Union’s severance pay claims are not entitled to an administrative priority if the CBAs are rejected.⁷ The severance pay claims are based on CBAs entered into pre-petition, which provide for severance pay, contingent on an employee being terminated without cause, based on the employee’s length of service prior to termination. As the Tenth Circuit observed in *Commercial Financial*, the facts the agreement was a pre-petition contract, that the debtor in possession continued to employ the employees post-petition, and that payment was contingent on termination without cause, which occurred post-petition, all are insufficient to establish a transaction with the debtor in possession for administrative priority purposes. 246 F.2d at 1294-95.

B. Alternatively, the Severance Claims Should be Treated as Administrative Claims only to the Extent Attributable to Post-Petition Services.

Other courts, which appear to apply only the second prong of the *Amarex/Mammoth Mart* test to severance claims, hold that severance pay claims based on

⁷ As urged above, the CBAs have neither been assumed nor rejected, and the Debtor still has the right to seek rejection.

years of severance, such as the Union's severance claim here, are entitled to an administrative priority limited to the pro rata portion of the services provided to the estate post-petition. *See e.g., Roth American*, 975 F.2d at 957; *In re Russell Cave Co., Inc.*, 248 B.R. 301, 303 (Bankr. E.D. Ky. 2000). Even under these more liberal cases, the Union severance claims would be limited to the portion attributable to post-petition services.

C. The Union's Arguments About Furr's Promises Do Not Change The Result.

The Union asserts that the Debtor promised its union employees, post-petition, that its severance pay policy would not change, and contends that this promise caused all severance pay to achieve administrative expense status under the *Amarex/Mammoth Mart* test. That argument fails. At most, the alleged promises (which the Debtor disputes) would either (i) arguably cause the severance obligations attributable to post-petition service to have administrative expense status, or (ii) cause no change in the treatment of the severance claims, but possibly give rise to independent, disputed tort claims of individual employees who allege they relied upon the alleged promises to their detriment if the elements of a tort could be proven (which the Debtor disputes).

1. The Union Exhibits. The Union offers Exhibits B, C, D and I to its brief in support of its argument that the alleged promises converted the pre-petition severance claims into administrative expense claims.⁸ Exhibit B is a newsletter that gives

⁸ Although the Union attached the newsletter and memoranda to its brief, the Union does not refer to the extensive discussions between it and the Debtor in July and August 2001 regarding the payment of severance benefits. If it becomes relevant, the evidence would show that beginning in approximately early July 2001, and continuing in July and August of 2001, the Debtor apprised senior Union personnel at the International and Regional levels that there would be insufficient funds to pay severance and other claims under the CBAs. In fact, the Debtor and Union negotiated a modification to the CBAs in connection with the Debtor's ill-fated "wind-down plan." The modification provided, among other things, for payment of severance benefits in a

an update concerning the Fleming transaction. The newsletter simply states with respect to severance “there will be no change to associate benefits through the closing of the sale.” In fact, if relevant, the evidence would show that the Debtor did honor its severance payment obligations to employees through the close of the sale, as it was authorized to do under one of the first day orders relating to employee benefits.

The other three memos attached to the Union’s brief relate to the closing of stores 878, 880 and 950, which Furr’s decided in August 2001 to close after Fleming carved those stores out of the purchase. The memos describe the Company’s policy with respect to payment of severance as set forth in the CBAs. As discussed above, Bankruptcy Code §507 does not affect the Debtor’s obligations (or policies) with respect to severance pay benefits, but establishes the priority of the claims for purposes of payment.

2. At Most, the Memos Satisfy the First Prong of the Amarex/Mammoth Mart Test. Even if the Court were to conclude that the memos were poorly worded, and gave rise to expectation about payment of severance and vacation claims that are different from what is allowed under §507, the memos could not be deemed to convert the entire \$10 Million pre-petition severance claim into a post-petition administrative expense claim. Rather, at most, the memos could be construed to satisfy the first prong of the *Amarex/Mammoth Mart* test, which would result in the type of pro-ration discussed above. The first prong of the test requires that the claim arise out of a transaction between the claimant and debtor in possession. In *Commercial Financial*, the

substantially reduced amount. The Debtor further negotiated with its secured lenders for the use of sale proceeds to fund this obligation. The Debtor would have no reason intentionally to mislead its employees with respect to severance, as evidence would show that the Debtor did not have a substantial concern about have an adequate workforce at the store level through the close of the Fleming sale.

Tenth Circuit found that continuing to work for a debtor in possession position does not form the necessary nexus between the debtor in possession and claimant to satisfy this requirement. The Debtor asserts that the newsletter and memos, when combined with such continued work of the Debtor, likewise do not form the necessary nexus between the debtor in possession and claimant, under the test, as the claim is not really based on the memos but the CBAs.

In any event, however, even if the first prong of the *Amarex/Mammoth Mart* test somehow were satisfied, the administrative claim would be limited to the portion of the claim attributable services rendered post-petition. Only post-petition services represented consideration supplied to and that benefited the debtor in possession. It is premature for this court to determine the amount of the claim, even if it finds the second prong of the test to be satisfied, until it is determined whether the CBAs will be rejected.

3. The Memos Did Not Create a New Agreement. Contrary to the Union's argument, the memos cannot be construed as resulting in a new contract between the Debtor and its unionized employees. The terms and conditions of employment for Debtor's union workforce are negotiated between the Debtor and the Union, as the employees' exclusive collective bargaining representative (see CBAs, Section 1.1). While the Debtor is in chapter 11, the terms of the CBAs cannot be changed without Court approval, after notice and hearing, to avoid irreparable harm to the estate. Code §1113(e). Further, even if Code §1113(e) did not apply (which it does), any change to such terms of employment, potentially resulting in an administrative obligation of over

\$10 Million for a few weeks of work, would not be in the ordinary course of business and therefore would require Court approval under Code §363(b)(1).

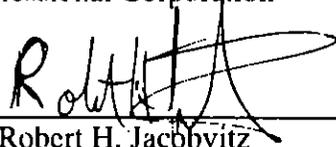
4. Alternatively, the Memos Had No Effect Except to Form the Disputed Basis for Independent Claims of Certain Union Employees. An alternative interpretation of the allegations about the memos is that they did not change the pre-petition severance claims into post-petition administrative claims, but instead gave rise to disputed independent tort claims. If a tort were alleged, the damages would be limited to those proximately caused by the tortuous act. Here, unless a particular employee were to demonstrate special damages, the employees simply continued to work for a few weeks, or less, for which they received their wages. The Union would not have standing to assert tort claims for its employees generally. Instead, each employee who claimed justifiable reliance and damages caused by the memos could file an application for administrative expense, and the Court could rule on the alleged claim. The Debtor believes that no former employee could have suffered damages because they simply continued to work for a short time in exchange for their salary. The Debtor also believes that neither the newsletter nor memos forms the basis of an actionable tort claim.

VI. CONCLUSION

The Union seeks to impose a \$10 Million severance obligation on the Debtor's chapter 11 estate, but demonstrated no basis for doing so. The CBAs under which the Debtor's severance pay obligations accrue have not been assumed, either explicitly or implicitly, and the letter and policy of the Bankruptcy Code weigh heavily against the type of informal assumption the Union advocates. The case law is clear that absent Court-approved assumption, the severance claims are either entirely pre-petition

unsecured claims, or else are entitled to administrative expense priority only on a pro-rated post-petition basis. The memos upon which the Union relies so heavily do not change the result. The Motion therefore should be denied.

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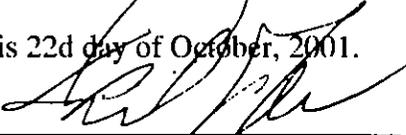
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